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No. 96-546

In The

Supreme Court of the United States

October Term, 1996

CHARLES HINES,

Petitioner,

vs.

ABB VETCO GRAY, INC.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

LAWRENCE J. McNAMARA
Counsel of Record
PAUL G. NASON
R. JEFFREY WORTH
LIDDELL, SAPP, ZIVLEY,
HILL & LABOON, L.L.P.
Attorneys for Respondent
2200 Ross Avenue
Suite 900
Dallas, Texas 75201
(214) 220-4800

70052 (800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21 Lutz Appellate Services, Inc.

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QUESTION PRESENTED

Whether a plaintiff may challenge a release of an Age Discrimination in Employment Act claim while retaining the consideration paid to him for the release of such claim, where that release failed to comply with the Older Workers Benefit Protection Act, or whether such retention constitutes effective common law ratification.

PARTIES TO THE PROCEEDING

Petitioner, appellant below, is Charles Hines. Respondent, appellee below, is ABB Vetco Gray, Inc. Pursuant to Supreme Court Rule 29.1, Respondent discloses that the parent companies of Respondent ABB Vetco Gray are ABB Oil and Gas USA Inc., a Delaware corporation, Asea Brown Boveri AS, a Norwegian company, and ABB Asea Brown Boveri Ltd., a Swiss company. ABB Vetco Gray's subsidiaries (other than wholly owned subsidiaries) are ABB Holdings Limited (England), ABB Vetco Gray Kazakhstan, PT Vetco Gray Indonesia, and PT Aisabayu Berkak (Indonesia).

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The Respondent, ABB Vetco Gray, Inc. ("ABB Vetco Gray"), respectfully files this Brief in Opposition and requests that this Court deny the Petition for Writ of Certiorari seeking review of the Fifth Circuit's opinion in this case entered on April 29, 1996.

STATEMENT OF THE CASE

ABB Vetco Gray adopts by reference the statement of facts or "Background" in the District Court's Order dated September 14, 1995, granting summary judgment in favor of ABB Vetco Gray. (Petitioner's Appendix ("Pet. App.") B-3, B-4). Respondent challenges paragraphs 8, 10, 11, 12 and 13 of Petitioner's Statement of Facts as argumentative, irrelevant, and not established by the evidence in the courts below.

REASONS FOR DENYING THE WRIT

The Petitioner commenced this action on April 18, 1995, alleging age discrimination in violation of the Age Discrimination in Employment Act ("ADEA"). 29 U.S.C. §§ 621-634. Respondent filed a timely answer and counterclaim for breach of a waiver agreement; Petitioner had signed a release waiving any age discrimination claims in exchange for extra severance benefits to which the Petitioner was not otherwise entitled. In response to Respondent's counterclaim, the Petitioner alleged that the waiver was unenforceable because it failed to comply with the requirements of the Older Workers Benefit Protection Act ("OWBPA"). 29 U.S.C. § 626(f). The District Court granted summary judgment in favor of the Respondent, finding that the Petitioner had ratified the allegedly unenforceable waiver by failing to timely tender back the severance consideration. (Pet. App. B). Pursuant to its well established precedent, the Fifth Circuit affirmed. (Pet. App. A).

The decisions of the courts below were correct, and the

Petition for Writ of Certiorari should be denied, because: (1) the tender back rule is consistent with the language of the OWBPA; (2) the tender back rule, as applied to ADEA waivers, is not invalidated by this Court's decision in *Hogue v. Southern Ry. Co.*, 390 U.S. 516 (1968); (3) the tender back rule is correct as a matter of policy; and (4) there is no active conflict among the courts of appeal with regard to the tender back requirement.

I.

THE FIFTH CIRCUIT'S TENDER BACK RULE IS CONSISTENT WITH THE LANGUAGE OF THE OLDER WORKERS BENEFIT PROTECTION ACT.

Effective October 16, 1990, the ADEA was amended by the OWBPA. In enacting the OWBPA, Congress resolved a split among the circuits by codifying the "totality of the circumstances" test for determining the validity of a waiver of ADEA claims.[1] The legislative history of the OWBPA indicates that the fundamental purpose of the OWBPA's waiver provisions was to ensure that waivers were obtained without fraud, duress, coercion, or mistake of material facts.[2]

Petitioner contends that the plain language of the OWBPA

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1. *See* S. Rep. No. 263, 101st Cong., 2d Sess. 32, *reprinted in* 1990 U.S.CODE CONG. & ADMIN.NEWS 1509, 1537 ("The Committee expects that courts reviewing the "knowing and voluntary" issue will scrutinize carefully the complete circumstances in which the waiver was executed. The Committee expreses (sic) support for the [totality of the circumstances] approach taken on this limited issue in *Cirillo v. Arco Chemical Co.*, 862 F.2d 448 (3rd Cir. 1988), and disapproves the [ordinary contract principles] approach adopted in *Lancaster v. Buerkle Buick Honda Co.*, 809 F.2d 539 (8th Cir. 1987), *cert. denied*, [482 U.S. 928, 107 S. Ct. 3212, 96 L.Ed.2d 699] (1987).").

2. *Id.*

precludes ratification of a release otherwise in violation of the OWBPA. The language upon which the Petitioner relies states that an individual "may not" waive any ADEA claim unless the waiver is knowing and voluntary. 29 U.S.C. § 626(f)(1). In effect, Petitioner argues that the OWBPA abrogates the application of common law contract principles to the enforceability of ADEA waivers, other than those expressly codified by the OWBPA. As discussed below, Petitioner's arguments are without merit.

By its terms, the OWBPA merely codifies, in the context of claims under the ADEA, a centuries-old principle that a "waiver" must be "knowing and voluntary." *Id.* In contending that the OWBPA abrogates the equally venerable common law principle of ratification, the Petitioner not only ignores the statute's plain language, but entirely ignores the common law background against which the OWBPA was enacted. Moreover, the Petitioner disregards the well-established principles applicable to claims of statutory abrogation of the common law.

It is undisputed that the Petitioner's claim would be barred by the common law ratification doctrine. At common law, releases tainted by fraud, mistake or duress are merely voidable, not void, at the option of the defrauded, mistaken or coerced party. *Wamsley v. Champlin Refining & Chemicals, Inc.*, 11 F.3d 534, 538 (5th Cir. 1993), *cert. denied*, 115 S. Ct. 1403 (1995); *Morta v. Korea Ins. Corp.*, 840 F.2d 1452, 1455 (9th Cir. 1988) (Guam law); *Ott v. Midland-Ross Corp.*, 523 F.2d 1367, 1368 (6th Cir. 1975) (federal common law under the ADEA). However, the common law also makes clear that such a voidable release can be ratified: "the releasor who retains consideration after learning that the agreement is voidable has effectively ratified the release and may not later avoid its terms." *Cumberland & Ohio Co. of Texas, Inc. v. First American Nat'l Bank*, 936 F.2d 846, 850 (6th Cir. 1991), *cert. denied*, 502 U.S.

1034 (1992).[3] Ratification does not amount to enforcement of the release as a contractual obligation; put simply, the plaintiff's subsequent conduct in retaining the consideration paid to obtain the release makes prosecution of the claims fundamentally unfair. *Wamsley*, 11 F.3d at 540 n. 11; *Blistein v. St. John's College*, 74 F.3d 1459, 1466 (4th Cir. 1996); *see also Cumberland*, 936 F.2d at 850; *In re Boston Shipyard Corp.*, 886 F.2d at 455; *Anselmo v. Manufacturers Life Ins. Co.*, 771 F.2d 417, 420 (8th Cir. 1985).

Prior to the enactment of the OWBPA, courts routinely applied ratification principles to ADEA releases. *See, e.g., O'Shea v. Commercial Credit Corp.*, 930 F.2d 358, 362 (4th Cir.), *cert. denied*, 502 U.S. 859 (1991); *Grillet v. Sears, Roebuck & Co.*, 927 F.2d 217 (5th Cir. 1991). As recognized by the Fifth Circuit, nothing in the OWBPA abrogates the common law principle that an invalid waiver can be ratified by subsequent conduct. *See Wamsley*, 11 F.3d at 539.[4]

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3. *See also Fleming v. United States Postal Service AMF O'Hare*, 27 F.3d 259 (7th Cir. 1994), *cert. denied*, 115 S. Ct. 741 (1995) (federal common law); *In re Boston Shipyard Corp.*, 886 F.2d 451, 455 (1st Cir. 1989) (federal common law); *Regional Properties, Inc. v. Financial & Real Estate Consulting Co.*, 752 F.2d 178, 182 (5th Cir. 1985) (Texas law); *DiRose v. PK Management Corp.*, 691 F.2d 628, 633-34 (2d Cir. 1982) (New York law), *cert. denied*, 461 U.S. 915 (1983).

4. Petitioner's almost exclusive reliance on the language of the OWBPA for the contention that the principles of ratification are inapplicable is curious. The court in *Forbus v. Sears, Roebuck & Co.*, 958 F.2d 1036 (11th Cir.), *cert. denied*, 506 U.S. 955 (1992), a case relied upon by the Petitioner, did not consider the language of the OWBPA and in *Oberg v. Allied Van Lines, Inc.*, 11 F.3d 679 (7th Cir. 1993), *cert. denied*, 114 S. Ct. 2104 (1994), also relied upon by Petitioner, the Seventh Circuit specifically relied on the *Forbus* decision in its analysis. In addition, the Seventh Circuit's observation in *Oberg* that the "language of the OWBPA . . . forbids any waiver" is suspect. *Id.* at 683. Clearly, the OWBPA does not forbid "any waiver" since the purpose of the OWBPA was to set standards for ADEA waivers. Instead, the OWBPA makes clear that any waiver must be "knowing and voluntary."

As observed by the Fourth Circuit in *Blistein*, Congress' reliance upon the common law terms "knowing" and "voluntary" suggests that Congress "was defining only those circumstances in which a contract would be voidable, not when it would be void." *Blistein*, 74 F.3d at 1466. "Indeed, if anything, the text of OWBPA lends support to that holding through its implicit recognition that an ADEA release agreement that does not meet the OWBPA's requirements is merely a voidable, not a void, contract." *Id.* In *Wamsley*, the Fifth Circuit observed that at common law, fraud, duress and mistake did not void a contract, but, rather, only rendered that contract voidable." *Wamsley*, 11 F.3d at 538 (citing RESTATEMENT (SECOND) OF CONTRACTS § 7 cmt. b).

The conclusion that a release which fails to satisfy the OWBPA's requirements is merely voidable is further bolstered by Congress' inclusion of § 626(f)(1)(G). Section 626(f)(1)(G) expressly provides that for seven days after execution of a waiver agreement an employee may revoke the agreement and that the agreement does not become enforceable until the expiration of the seven day revocation period. 29 U.S.C. § 626(f)(1)(G). "If noncompliance with the other subparts . . . rendered the agreement void there would be no need for subpart (G)." *Wamsley*, 11 F.3d at 539. Surely Congress would not give an employee the right to void a non-complying release, as provided in subpart (G), if such a release were void *ab initio*. The Petitioner has failed to present any evidence that Congress intended such an anomalous result.

In addition, the express language of the OWBPA fully empowered the court of appeals to bar the Petitioner's claims. It is undisputed that the OWBPA did nothing to erase the ADEA's broad grant of equitable power to the courts. 29 U.S.C. § 626(b). Equitable power implies not only the discretion to apply specific common law doctrines, such as ratification, *see, e.g., Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393-94 (1982);

Occidental Life Ins. Co. of California v. EEOC, 432 U.S. 355, 373 (1977), but an even broader discretion to deny remedies which would be unjust and unfair. *See McKennon v. Nashville Banner Pub. Co.*, 115 S. Ct. 879 (1995). Thus, contrary to the Petitioner's claims, the specific language of the OWBPA supports the ruling below.

Further, the OWBPA does not exhaustively control the enforceability of ADEA waivers. Nothing in the OWBPA prohibits application of common law principles to ADEA waivers. In fact, employees continue to challenge the enforceability of ADEA waivers on common law, non-statutory grounds. *See Griffin v. Kraft General Foods, Inc.*, 62 F.3d 368 (11th Cir. 1995) (ADEA release challenged under common law fraud doctrine and other non-statutory ground); *Rivers v. Northwest Airlines, Inc.*, 1995 WL 888612 (E.D. Mo.), *aff'd*, 72 F.3d 133 (8th Cir. 1995) (alleged involuntariness of release not the result of lack of compliance with the requirements of the OWBPA). For example, in *Wittorf v. Shell Oil Co.*, 37 F.3d 1151 (5th Cir. 1994), in which the Fifth Circuit required tender back, there was no dispute that the OWBPA requirements were satisfied. Thus, it is neither improper nor inconsistent to allow employers to assert common law defenses, such as ratification, when employees continue to enjoy a full panoply of common law challenges to ADEA waivers. Rather, precluding application of such defenses, while continuing to permit common-law challenges, as urged by the Petitioner, would create an inequitable inconsistency in this nation's labor policy.

Finally, the Petitioner's contention that the OWBPA abrogates the application of well-settled common law doctrines is in direct contravention of this Court's precedent that "[w]here a common-law principle is well established the courts may take it as given that Congress has legislated with an expectation that the principle will apply except 'when a statutory purpose to the

contrary is evident.' " *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 108 (1991) (citations omitted). Indeed, this Court has repeatedly made clear that "[i]n order to abrogate a common law principle, the statute must 'speak directly' to the question addressed by the common law." *United States v. Texas*, 507 U.S. 529, 534 (1993) (quoting *Mobil Oil Corp. v. Higinbotham*, 436 U.S. 618, 625 (1978)). *See also Norfolk Redevelopment & Housing Auth. v. Chesapeake & Potomac Tel. Co. of Virginia*, 464 U.S. 30, 35-36 (1983). These principles are equally applicable to federal antidiscrimination statutes. *Zipes*, 455 U.S. at 393-94 (Title VII limitations defenses subject to waiver, estoppel and equitable tolling); *Occidental Life Ins. Co.*, 432 U.S. at 373 (EEOC right of action subject to laches).

Nothing in the OWBPA "speaks directly" to the common law principle of ratification. Petitioner has failed to cite any piece of legislative history which would suggest that Congress intended to abrogate the application of common law ratification principles to ADEA waivers. Rather, as discussed above, the OWBPA's legislative history clarifies that Congress was simply codifying settled common law principles, under which any release must be, at a minimum, knowing and voluntary. The principle that a waiver is voidable if its execution was not "knowing and voluntary" has long co-existed with the separate and distinct principle that an otherwise invalid waiver is nevertheless subject to ratification by subsequent conduct. As Respondent has shown, the OWBPA does nothing to alter this longstanding harmonious relationship.

II.

THIS COURT'S DECISION IN *HOGUE V. SOUTHERN RY. CO.* DOES NOT INVALIDATE THE FIFTH CIRCUIT'S TENDER BACK REQUIREMENT.

Petitioner also asserts that this Court should grant certiorari because the Fifth Circuit's tender back rule, as relied upon by the lower courts in this case, is inconsistent with this Court's decision in *Hogue v. Southern Ry. Co.*, 390 U.S. 516 (1968).

In *Hogue*, the petitioner suffered an injury while working in the respondent's shops. Subsequently, the petitioner executed a release in consideration for the respondent's payment of $105. After discovering that his injury was more serious than he previously thought, the petitioner sued the respondent under the Federal Employer Liability Act ("FELA"), 45 U.S.C. § 51-60, claiming that the release was executed as the result of a mutual mistake of fact.

The petitioner was unsuccessful in the lower courts. The Georgia Court of Appeals ruled that a plaintiff who attacks a previously executed release under the FELA, must, as a condition to bringing his suit, tender back to the employer the consideration he received for the release. The petitioner subsequently sought relief in this Court.

This Court reversed the Georgia Court of Appeals, holding that a tender back of consideration received by the petitioner for a release was not a prerequisite to him bringing suit under the FELA for his injury. *Id.* at 516-18. This Court reasoned as follows:

> [A] rule which required a refund as a prerequisite to institution of suit would be wholly incongruous with the general policy

> of the Act to give railroad employees a right to recover just compensation for injuries negligently inflicted by their employers. Rather, it is more consistent with the objectives of the Act to hold, as we do, that it suffices that, except as the release may otherwise bar recovery, the sum paid shall be deducted from any award determined to be due to the injured employee.

Id. at 518.

Petitioner claims that the Fifth Circuit's tender back rule, as relied upon by the lower courts, is inconsistent with *Hogue*. In addition, the authority upon which Petitioner relies to challenge the tender back rule is primarily based on *Hogue*. *See Oberg*, 11 F.3d 679 (7th Cir. 1993); *Forbus*, 958 F.2d 1036 (11th Cir. 1992); *Isaacs v. Caterpillar, Inc.*, 765 F. Supp. 1359 (C.D. Ill. 1991). Plaintiff, however, provides neither argument nor analysis establishing why this Court's interpretation of a tender back requirement under the FELA should be applicable to the ADEA. A closer examination of the *Hogue* decision, as well as the purposes of, and policies behind, the FELA and the ADEA, strongly suggests that *Hogue* is inapplicable to this case.

Initially, the procedural posture of *Hogue* makes it very weak support for Petitioner's contention that the no tender back rule should be extended from the FELA to the ADEA. In *Hogue*, after this Court granted certiorari, the respondent employer confessed error and declined to present either briefing or oral argument. 390 U.S. at 516. The Court issued a brief three page *per curiam* opinion, limited to claims under the FELA and releases challenged on the ground of mutual mistake, without the benefit of adversarial presentation. *See id.* at 517. Noticeably absent from Petitioner's brief is citation to any opinion of this Court in which it has foreclosed the application of the ratification

doctrine under circumstances remotely similar to those presented in this case.

Moreover, as the Fifth Circuit has recognized, *Hogue's* FELA-based holding cannot be fairly extended beyond the unique context of that particular statute. *See Wamsley*, 11 F.3d at 540-41. The FELA provides that railroads operating in interstate commerce:

> shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce . . . for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances machinery, track, roadbed, works, boats, wharves, or other equipment.

45 U.S.C. § 51.

The purpose of the FELA is to provide a broad remedial framework for railroad workers injured by the negligence of their employers and, in light of that purpose, is to be liberally construed in their favor. *Atchison, Topeka & Santa Fe Ry. Co. v. Buell*, 480 U.S. 557, 561-62 (1987); *see also Kernan v. American Dredging Co.*, 355 U.S. 426, 432 (1958) (FELA designed "to provide for liberal recovery"). The FELA's legislative history makes this purpose clear:

> [T]he employers' liability law . . . places such stringent liability upon the railroads for injuries to their employees as to compel the highest safeguarding of the lives and limbs

> of the men in this dangerous employment. . . . It was the intention of Congress in the enactment of this law . . . to shift the burden of the loss resulting from these casualties from "those least able to bear it" and place it upon those who can . . . "measurably control their causes."[5]

To promote the goal of liberal recovery, the FELA's statutory liability scheme strips an employer of its common law defenses and imposes liability if the employer's "negligence played any part, even the slightest, in producing the injury for which damages are sought." *Wamsley*, 11 F.3d at 541 (quoting *Rogers v. Missouri Pacific R. Co.*, 352 U.S. 500, 506-07 (1957)); *see also Buell*, 480 U.S. at 562 n. 8. A plaintiff's burden in a FELA action is therefore significantly lighter than it would be in an ordinary negligence action. *Lisek v. Norfolk and Western Ry. Co.*, 30 F.3d 823, 832 (7th Cir. 1994), *cert. denied*, 115 S. Ct. 904 (1995). Thus, in *Hogue*, this Court merely advanced the FELA's purpose of providing liberal recovery to workers for injuries sustained in their inherently dangerous occupations. *Wamsley*, 11 F.3d at 541.

On the other hand, Congress passed the ADEA to:

> [P]romote the employment of older persons based on their ability rather than their age; to prohibit arbitrary age discrimination in employment; [and] to help employers and workers find a way of meeting problems arising from the impact of age on employment.

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5. *Wamsley*, 11 F.3d at 541 n. 12 (quoting Griffith, *The Vindication of a National Policy Under the Federal Employers' Liability Act*, 18 Law & Contemp. Prob. 160 (1953) (quoting from 45 Cong. Rec. 4041 (1910))).

29 U.S.C. § 621(b). Noticeably absent from the language of the ADEA and its legislative history is any evidence that Congress enacted the ADEA to promote liberal, unburdened and expeditious recoveries to employees. *Wamsley*, 11 F.3d at 541-42. In fact, unlike the FELA, which requires no more proof than that the employer's negligence played *any* role in the employee's injury, an ADEA plaintiff cannot succeed unless he or she establishes intentional discrimination. *Biggins v. Hazen Paper, Co.*, 507 U.S. 604 (1993).[6] To establish intentional discrimination under the ADEA, the plaintiff must establish that the employer's action was based on the plaintiff's age and that the plaintiff's age was, in fact, the determinative factor in the employer's decision to take such action. *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 513 (1993); *Hazen Paper*, 507 U.S. at 610.

Further, the FELA expressly states that "[a]ny contract, rule, regulation or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created under this chapter, shall to that extent be *void*." 45 U.S.C. § 55 (emphasis added). The OWBPA, by contrast, does not render contractual waivers void, but merely requires them to be "knowing and voluntary" under specified standards. 29 U.S.C. § 626(f)(1).

Moreover, as recognized by the Fifth Circuit, there are

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6. Although this Court has not addressed the issue, most courts doubt that a disparate impact claim can be asserted under the ADEA. *See Hazen Paper*, 507 U.S. at 610 ("[W]e have never decided whether a disparate impact theory of liability is available under the ADEA."); *Ellis v. United Airlines, Inc.*, 73 F.3d 999, 1007-10 (10th Cir.), *cert. denied*, 116 S. Ct 2500 (1996); *Lyon v. Ohio Educ. Ass'n & Prof'l Staff Union*, 53 F.3d 135, 139 n. 5 (6th Cir. 1995); *DiBiase v. SmithKline Beecham Corp.*, 48 F.3d 719, 732-34 (3rd Cir.), *cert. denied*, 116 S. Ct. 306 (1995); *EEOC v. Francis W. Parker Sch.*, 41 F.3d 1073, 1076-78 (7th Cir. 1994), *cert. denied*, 115 S. Ct. 2577 (1995).

crucial differences between settling FELA claims and settling a potential claim under the ADEA. *See Wamsley*, 11 F.3d at 542.[7] In the case of a FELA claim, the employee has already suffered an injury and the only remaining issue is the amount of damages. *Id.* In contrast, when an employee is being terminated, there has not necessarily been an injury resulting from age discrimination; both the issues of liability and damages remain unresolved. As discussed above, an ADEA plaintiff must prove that the employer terminated him *because* of his age. *Hazen Paper*, 507 U.S. at 610. In offering a severance package in exchange for a release, the employer is merely seeking to "compromise in advance a potential age discrimination event and to offset in advance any loss and injury which an employee might experience if such an event were to occur." *Wamsley*, 11 F.3d at 542.

In a FELA case, offsetting severance compensation from total damages is more appropriate since there is little dispute that the employee has been injured. On the other hand, in an ADEA case, neither liability nor damages are presumed. Permitting the plaintiff to retain severance benefits paid in consideration for a release until after these issues have been fully litigated (no doubt several years and thousands of dollars later) is clearly inappropriate, as the very purpose of the release for the employer is to avoid such costly litigation.

Thus, application of *Hogue's* FELA-based holding to ADEA severance situations is, as found by the Fifth Circuit, incongruous. *Id.* at 541 n. 13.

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7. Although *Wamsley* addressed the differences in the context of a reduction in force, the same analysis applies to this case in which the employer terminated the employee.

III.

THE FIFTH CIRCUIT'S TENDER BACK RULE, AS FOLLOWED BY THE COURTS BELOW, IS CORRECT AS A MATTER OF POLICY.

The issue in this case is very simple: whether an employee who receives severance compensation in exchange for a release of, *inter alia*, an age discrimination claim, may retain such compensation while challenging the release by suing the employer for age discrimination.[8] The answer must be no. A contrary answer would permit the employee to finance litigation against his or her employer with the same funds the employer paid the plaintiff as consideration for a release from such litigation. A plaintiff simply cannot have it both ways: i.e., retaining the benefits received pursuant to a severance agreement, yet challenging the very agreement under which those benefits were paid. *Blistein*, 74 F.3d at 1466.[9]

The courts which have not required a plaintiff to tender back the compensation received as a condition of suing the employer have expressed concern that such a rule would "chill" legitimate age discrimination lawsuits.[10] *See, e.g., Isaacs v. Caterpillar,*

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8. Under the OWBPA and the common law, compensation sufficient to support a release must consist of compensation to which the employee is not otherwise entitled. 29 U.S.C. § 626(f)(1)(D).

9. As the Fourth Circuit stated in *Blistein*: "[i]f we were to follow *Oberg* . . . we would allow persons like [the plaintiffs] to have it 'both ways,' to retain the benefits that they receive pursuant to their retirement agreements, yet to challenge, through suits against their unsuspecting employers, the very agreements under which those benefits were extended. This, we find no evidence Congress contemplated." 74 F.3d at 1466.

10. Such a concern concedes Respondent's position that allowing a (Cont'd)

Inc., 765 F. Supp. 1359 (C.D. Ill. 1991). Such a concern simply does not comport with reality. It is undisputed that the overwhelming majority of plaintiffs enter into contingent fee arrangements with their lawyers, whereby the costs of litigation are taken from the ultimate recovery. It cannot be seriously argued that the Fifth Circuit's tender back rule "chills" contingent fee agreements. Moreover, requiring a plaintiff to tender back severance/release consideration merely requires the plaintiff to return to the position in which he or she would have been absent the severance agreement: with the ability to file a lawsuit but without the compensation the employer paid to avoid such lawsuit. Such a *status quo ante* result places all parties on equal footing.

Rather than "chill" lawsuits by plaintiffs, a refusal to require a tender back in ADEA cases would more likely "chill" settlements or an employer's willingness to offer such added severance benefits. If confronted with a no tender back rule, employers would have reduced incentive to prospectively settle possible age cases or to provide employees with extra severance compensation in exchange for a release. Fearing a technical violation of the OWBPA, employers would be more inclined to retain severance benefits to finance the defense of the age cases that are actually filed.[11] This result would run contrary to the

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plaintiff to retain the severance compensation provides the financing for the plaintiff's lawsuit. Additionally, this position is legally irrelevant since the pertinent question is not the wisdom or fairness of the tender back rule and ratification, but whether the OWBPA has directly abrogated them. *See United States v. Texas*, 507 U.S. 529, 534 (1993).

11. In *Fleming v. United States Postal Service AMF O'Hare*, 27 F.3d 259, 260-61 (7th Cir. 1994), *cert. denied*, 115 S. Ct. 741 (1995), the Seventh Circuit endorsed the principle that the tender back rule makes releases more valuable to employers and encourages voluntary settlements, which benefits both employees and employers in the long run.

ADEA's express purpose of helping employers and workers find a way of meeting problems arising from the impact of age on employment. *See* 29 U.S.C. § 621(b).

IV.

THERE IS NO ACTIVE CONFLICT BETWEEN THE CIRCUITS.

In urging this Court to grant his Petition for Writ of Certiorari, the Petitioner contends that a conflict exists among the courts of appeal, citing *Oberg v. Allied Van Lines, Inc.*, 11 F.3d 679 (7th Cir. 1993) and *Forbus v. Sears, Roebuck & Co.*, 958 F.2d 1036 (11th Cir. 1992). However, upon scrutiny, it is apparent that the alleged conflict is one of form rather than substance. As Justice Harlan explained, certiorari should be denied "where it seems likely that the conflict may be resolved as a result of future cases in the Courts of Appeals." Harlan, *Some Aspects of the Judicial Process in the Supreme Court of the United States*, 33 Austl. L.J. 108, 112 (1959). This is such a case. Recent jurisprudence from the Seventh Circuit signals a shift toward possible adoption of the tender back requirement. Further, the Eleventh Circuit has not readdressed the tender back issue since its 1992 pre-OWBPA *Forbus* decision, and consequently has failed to analyze many arguments supporting the tender back requirement. Finally, a trend is emerging in the nation's courts toward adoption of the tender back requirement.

The Petitioner correctly notes that in *Oberg*, the Seventh Circuit rejected any tender back requirement when confronted with a release of ADEA claims violative of the OWBPA. 11 F.3d at 684. However, the Petitioner fails to acknowledge that the Seventh Circuit subsequently questioned the reasoning of its *Oberg* decision and that of similar decisions, including *Forbus*. *Fleming v. United States Postal Service AMF O'Hare*, 27 F.3d 259 (7th Cir. 1994).

In *Fleming*, the Seventh Circuit enforced a tender back requirement where the plaintiff challenged the validity of a release of her Title VII and Rehabilitation Act claims. Speaking through Chief Judge Posner, a unanimous panel (Eshbach and Easterbrook, JJ.) cited the Fifth Circuit's *Wamsley* decision — with approval — for the proposition that "a release can be rescinded only upon a tender of any consideration received." 27 F.3d at 260-61. The Seventh Circuit held that, because the tender back rule is a widely accepted "general principle of contract law," it "would surely be a component of any federal common law of releases." *Id.* The Seventh Circuit explained in detail how this rule, by making releases more valuable to employers, and thus encouraging voluntary settlements, helps both employers and employees in the long run. "The tender requirement is not a remedy. It is a protection for defendants, although it may as we have noted benefit plaintiffs in the long run too; a premise of a free-market system is that both sides of the market, buyers as well as sellers, tend to gain from freedom of contract." *Id.* at 262.

Addressing age discrimination cases specifically, the Seventh Circuit noted that the common law rule "*may* have to give way," but noted that the Fifth Circuit in *Wamsley* had "strongly criticized our decision in *Oberg*." *Id.* at 261. (emphasis added). Tellingly, the Seventh Circuit referred to *Oberg* and its progeny as follows: "[t]he idea behind these cases . . . is a little obscure to us." *Id.* (citations omitted). Thus, it appears that this Court's intervention is not necessary to correct any perceived conflict between the Fourth, Fifth and Seventh Circuits as the emerging jurisprudence from the latter circuit appears to signal a shift toward adoption of the tender back requirement in employment cases generally.

The Petitioner also cites the Eleventh Circuit's *Forbus* decision as evidence of a conflict. Initially, it should be

highlighted that *Forbus* was a pre-OWBPA decision. In *Forbus*, the Eleventh Circuit relied almost entirely on this Court's holding in *Hogue* to reject a tender back requirement stating that neither the Fifth Circuit nor the Fourth Circuit had considered the *Hogue* decision in their analyses. *Forbus*, 958 F.2d at 1040-41.[12] Following the *Forbus* decision, the Fifth Circuit addressed the alleged impact of *Hogue* and the OWBPA and continues to refuse to enforce a similar rule under the ADEA. *See Wamsley*, 11 F.3d at 540-542. Importantly, the Eleventh Circuit has not revisited the tender back requirement since *Forbus*, and as a result, has not addressed the Fifth Circuit's thoughtful analysis of *Hogue* and the OWBPA. Thus, this Court's intervention at this time would arguably be premature.

Additionally, a trend is emerging in this nation's courts toward adoption of the tender back requirement. *See Blistein*, 11 F.3d 1459; *Hodge v. New York College of Podiatric Medicine*, 1996 WL 527330 (S.D.N.Y. 1996) (following the rationale and rule of *Wamsley*); *Long v. Sears, Roebuck & Co.*, 1996 WL 94537, 7 (E.D. Pa. 1996) ("We believe that *Wamsley* is consistent with this jurisdiction's pre-OWBPA jurisprudence and would be followed if presented to the Third Circuit"); *Rivers*, 1995 WL 888612 (E.D. Mo. 1995) (adopting the reasoning of the Fifth Circuit in *Wamsley*, and noting the Seventh Circuit's questioning of its own decision in *Oberg*).[13] *See also Deren v. Digital Equip. Corp.*, 61 F.3d 1 (1st Cir. 1995) (enforcing tender back requirement where plaintiff sought to avoid release of alleged ERISA claims); *Fleming*, 27 F.3d 259. This trend itself is a sufficient ground upon which to deny certiorari.

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12. *Forbus* addressed the Fifth Circuit's decision in *Grillet v. Sears, Roebuck & Co.*, 927 F.2d 217 (5th Cir. 1991) and the Fourth Circuit's decision in *O'Shea v. Commercial Credit Corp.*, 930 F.2d 358 (4th Cir.), *cert. denied*, 502 U.S. 859 (1991), both pre-OWBPA cases.

13. *But see EEOC v. Sara Lee Corp.*, 923 F. Supp. 994 (W.D. Mich.

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Finally, this Court has repeatedly indicated in recent years that the precise judicial disagreement alleged by Petitioner does not presently warrant further review. The petitioners in *Oberg* and *Wamsley* each sought a writ of certiorari from this Court to address the questions and arguments asserted in the Petition *sub judice*. Nonetheless, this Court declined to review the issue each time. *See Oberg*, 114 S. Ct. 2104 (1994); *Wamsley*, 115 S. Ct. 1403 (1995).

As discussed above, the alleged conflict is one of form rather than substance. Considering the Seventh Circuit's apparent shift toward the tender back rule, the Eleventh Circuit is left as the sole court of appeal in apparent conflict with the Fifth Circuit. If presented with another opportunity to address this issue, and considering the language and legislative history of the OWBPA, the Fifth Circuit's *Wamsley* decision, and the Fourth Circuit's *Blistein* decision, it is possible that the Eleventh Circuit would similarly reverse field in the wake of the emerging trend toward adoption of the tender back requirement in employment cases. Until that time, this Court's intervention would likely be premature and arguably unnecessary.

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1995) (following *Oberg* and providing for deduction of severance benefits from any damages award); *Soliman v. Digital Equipment Corp.*, 869 F. Supp. 65 (D. Mass. 1994) (same).

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

LAWRENCE J. McNAMARA
Counsel of Record
PAUL G. NASON
R. JEFFREY WORTH
LIDDELL, SAPP, ZIVLEY,
HILL & LABOON, L.L.P.
Attorneys for Respondent
2200 Ross Avenue, Suite 900
Dallas, Texas 75201
(214) 220-4800